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10
 11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California
 corporation,
 14
 Plaintiff,

15 vs.

16 GOOGLE INC., a corporation; and
 17 DOES 1 through 100, inclusive,
 18 Defendants.

CASE NO. CV 04-9484 AHM (SHx)
 [Consolidated with Case No. CV 05-
 4753 AHM (SHx)]

**GOOGLE INC.'S EVIDENTIARY
 OBJECTIONS TO THE
 DECLARATION OF SHEENA
 CHOU IN OPPOSITION TO
 GOOGLE'S THREE MOTIONS
 FOR SUMMARY JUDGMENT RE
 DMCA SAFE HARBOR FOR ITS
 WEB AND IMAGE SEARCH,
 BLOGGER SERVICE, AND
 CACHING FEATURE**

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California
 corporation,
 21
 Plaintiff,

22 vs.

24 AMAZON.COM, INC., a corporation;
 25 A9.COM, INC., a corporation; and
 DOES 1 through 100, inclusive,
 26 Defendants.

Hon. A. Howard Matz

Date: None set (taken under
 submission)

Time: None set

Place: Courtroom 14

Discovery Cut-off: None Set
 Pre-trial Conference: None Set
 Trial Date: None Set

1 Google hereby submits the following objections to the Declaration of Sheena
2 Chou, Submitted in Opposition to Google Inc.'s Motions for Summary Judgment
3 Re: DMCA Safe Harbor for its Web and Image Search, Blogger Service, and
4 Caching Feature. The Chou Declaration is objectionable for several reasons, and
5 should be disregarded in its entirety.

6 **I. SHEENA CHOU WAS NEVER IDENTIFIED AS AN EXPERT, YET**
7 **IMPROPERLY ATTEMPTS TO OFFER EXPERT TESTIMONY IN**
8 **THIS MATTER.**

9 In her Declaration, Ms. Chou repeatedly offers improper opinion testimony,
10 including a detailed evaluation of Google's DMCA compliance program and an
11 explanation of her preferred methodology for identifying allegedly infringing web
12 sites. This testimony should be excluded on multiple grounds. First, Perfect 10
13 failed to disclose Chou as an expert witness in this matter, instead electing to spring
14 her declaration upon Google. Further, at no point does Chou tie her qualifications—
15 she claims to "have a degree in Economics from UCLA and [be] quite familiar with
16 computers and the Internet"—to Google's search engine or services. *See Daubert v.*
17 *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993) ("[requirement of fit] goes
18 primarily to relevance," and an expert's testimony must "aid the jury in resolving a
19 factual dispute."); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48
20 (1999) (expert must have some form of specialized knowledge). Quite simply,
21 having an college degree in an unrelated field and "familiarity" with computers does
22 not make one an expert in search engines or other Internet services. As Chou
23 appears to lack the necessary qualifications to testify as to Google's search engine or
24 services, again, her testimony should be stricken.

25 **II. PORTIONS OF THE EVIDENCE OFFERED BY PERFECT 10 IN THE**
26 **DECLARATION OF SHEENA CHOU ARE INADMISSIBLE AND**
27 **SHOULD BE DISREGARDED.**
28

1 The Declaration of Sheena Chou, submitted in opposition to Google Inc.'s
 2 Motions for Summary Judgment RE: DMCA Safe Harbor for its Web and Image
 3 Search, Blogger Service, and Caching Feature should be disregarded for purposes of
 4 the Google's motions, because it is inadmissible under the Federal Rules of
 5 Evidence.

6 Evidence submitted to the Court on motion practice must meet all
 7 requirements for admissibility of evidence if offered at the time of trial. *Beyene v.*
 8 *Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-1182 (9th Cir. 1988); *Travelers*
 9 *Cas. & Sur. Co. of America v. Telstar Const. Co., Inc.*, 252 F. Supp. 2d 917, 923 (D.
 10 Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings
 11 in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule
 12 101). Such evidence must be relevant to the claims and defenses of the case. Fed.
 13 R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at *3 (D.
 14 Kan. Jan. 5, 2007). Testimonial evidence must be based on the personal knowledge
 15 of the witness offering the evidence. Fed. R. Evid. 602. Testimony requiring
 16 scientific, technical, or other specialized knowledge may be given only by an expert
 17 witness with the requisite knowledge, skill, experience, training, or education, and
 18 opinion testimony is not permitted of a lay person. Fed. R. Evid. 701, 702; *see also*
 19 *U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc.*, 296 F. Supp. 2d 1322,
 20 1331 (S.D. Ala. 2003) (unqualified expert opinions inadmissible at summary
 21 judgment). The Chou Declaration fails to meet one or more of these criteria.

	<u>Proffered Evidence</u>	<u>Google's Objection</u>
24 25 26 27	1. Chou Decl., at ¶ 3 ("I have personally downloaded more than 15,000 Perfect 10 images from each of at least twenty of the pay sites	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statements are irrelevant (because Google does not crawl or link to content on Usenet sites or other

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listed on pages 5 and 6 of Exhibit 22 to the Declaration of Dr. Norman Zada (“Zada Declaration”), filed concurrently herewith. I have also downloaded thousands of Perfect 10 images from other pay sites listed on those pages. I am very familiar with Perfect 10’s images. I have reviewed Perfect 10’s website to become familiar with those images. In addition, many of the images from the infringing pay websites contain Perfect 10’s copyright notice on the image, as they appear on Perfect 10’s website, or are organized in groups of images with titles that clearly indicate that they are from Perfect 10, such as “Your requested P10 Website,” “Some of your P10 Gallery,” “Your P10 2006 fills,” “requested P10 2007’s.” The pay websites from which I have downloaded thousands of infringing Perfect 10 images include, but are not limited to: 100proofnews.com, 1usenet.com, active-news.com, alibis.com,

password-protected websites (Haahr Dec. ¶¶ 14-15)), speculative, lacks foundation, constitutes improper legal opinion, and does not appear to be based upon the witness's personal knowledge.

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	<p>anonymousnewsfeed.com, astraweb.com, athenanews.com, binaries.net, bubbanews.com, cheapnewsgroups.com, eurofeeds.com, fastusenet.com, galacticgroups.com, giganews.com, infinityusenet.com, maximumusenet.com, newsdemon.com, newsgroup- binaries.com, newsgroupdirect.com, newsgroups-download.com, newsreader.com planetnewsgroup.com, powerusenet.com, rhinonewsgroups.com, supernews.com, thundernews.com, tigerusenet.com, usenet.com, usenet- access.com, usenetunlimited.com, usenetgiant.com, usenetmonster.com, and usenetrocket.com.”)</p>	
2.	<p>Chou Decl., at ¶ 4 (“I have observed that those pay sites also offer thousands of full-length movies and songs. I have observed that Dr. Zada has downloaded large numbers of images from those sites as well. My experience with the pay sites listed</p>	<p><u>Fed. R. Evid. 401, 402, 403. 602, 701</u> The statements are irrelevant (Google does not crawl or link to content on Usenet sites or other password-protected websites, Haahr Dec. ¶¶ 14-15, and movies and songs not copyrighted by P10 are not at issue in</p>

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	<p>on pages 5 and 6 of Exhibit 22 of the Zada Declaration is that they all offer the same images, but that they rotate the images that they offer. In other words, a particular group of Perfect 10 images (“P10 Images”) may be available for download for several months, and then not available for several months, and then once again available. While one group of Perfect 10 images may not be available, other groups are. The period of time a group of images is available is often called the “retention period.” The websites have different retention periods. The longer the retention period, the greater the number of images that are available for download at any one time. That is why I was able to download more images from some sites than from others. But in the end, the P10 Images available from the aforementioned websites over time appear to be the same.”)</p>	<p>this case), and constitute improper legal opinion and opinion testimony by a lay witness.</p>
3.	Chou Decl., at ¶ 5 (“I have been able to readily find P10 Images on	<u>Fed. R. Evid. 401, 402, 403, 602</u> The statement is irrelevant (Google

<p>1 2 3 4 5 6 7</p>	<p>such websites by doing searches on “P10”; P10 in combination with a date, such as “P10 2004”; the model name; or the image URL of the image, such as Marisa_Miller_44.jpg.”)</p>	<p>does not crawl or link to content on Usenet sites or other password-protected websites (Haahr Dec. ¶¶ 14-15)), speculative, and lacks foundation.</p>
<p>8 9 10 11 12 13 14 15 16 17</p>	<p>4. Chou Decl., at ¶ 6 (“One of my other assignments has been to determine whether Google has removed from its search results, URLs identified by Perfect 10. I have been able to do this simply by inputting the URL provided by Perfect 10, without the starting http:// or www., into the Google search box.”)</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602</u> The statements are irrelevant, argumentative, speculative, lack foundation, are not within the witness’s personal knowledge, constitute improper legal opinion, and are improper opinion testimony.</p>
<p>18 19 20 21 22 23 24 25 26 27 28</p>	<p>5. Chou Decl., at ¶ 7 (“The Adobe files provided by Perfect 10 in its notices have been sufficient to allow Google to find the infringing material. I know this because I have extracted hundreds of URLs from those same files using Adobe’s URL extraction feature, and have placed those same URLs into Google’s search box or into my browser bar to verify that</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u> The statements are irrelevant, argumentative, mischaracterize the documents, speculative, lack foundation, are not within the witness’s personal knowledge, constitute improper legal opinion, and are improper opinion testimony. Ms. Chou has never been disclosed by P10 as an</p>

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	<p>those web pages were still either directly linked to by Google in its search results, or were still on Google’s blogger.com servers. I was able to locate the infringing material in this manner using the URLs provided by Perfect 10 in its notices. I have been able to extract URLs from Adobe documents at the rate of approximately 5 URLs a minute.")</p>	<p>expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
6.	Chou Decl., at ¶ 8	<p><u>Fed. R. Evid. 401, 402, 403, 602</u> The statements are irrelevant, argumentative, mischaracterize the document, speculative, lack foundation, are not within the witness’s personal knowledge, constitute improper legal opinion, and are improper opinion testimony.</p>
7.	Chou Decl., at ¶ 9 ("I was also assigned to determine the number of blogspot.com post URLs and other blogspot.com URLs that Perfect 10 identified to Google in its notices, and the number of identified blogspot.com post-URLs that Google had not suppressed as of July 2009. I will use the term “post URL” to refer	<p><u>Fed. R. Evid. 401, 402, 403, 602, 1002</u> The statement is argumentative, mischaracterizes the facts, irrelevant (because the number of alleged infringements has no bearing on the legal standards at issue for safe harbor), speculative, lacks foundation (among other things, the declarant provides no explanation for how or what she</p>

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to what Google’s Blogger DMCA instructions call the “permalink of the post.” I found at least 219 blogspot.com URLs that were not post URLs, and at least 329 blogspot.com post URLs, for a total of at least 548 blogspot.com URLs, that Perfect 10 identified to Google in its Adobe style notices, beginning June 28, 2007. Of the 329 post URLs identified to Google, at least 201 had not been suppressed as of July 2009.”)

allegedly did), and constitutes improper legal opinion and opinion testimony. The referenced URLs also violate the best evidence rule, because they constitute electronic excerpts of certain of P10’s DMCA notices, and the notices themselves are the best evidence of their contents.

8. **Chou Decl., at ¶ 10** (“I have observed that in a number of cases, the full-size blogger image still appears on Google’s blogger.com servers, even when the original blogspot site that displayed those images no longer exists. In those situations, there is no permalink or top level domain of the blog and date of the blog entry that Perfect 10 could provide, as requested by Google. Furthermore, Perfect 10 has provided the top level domain with the date, as well as the permalink, in

Fed. R. Evid. 401, 402, 403, 602, 701, 702
The statements are argumentative, irrelevant, speculative, lack foundation (among other things, no purported examples are provided), and constitute improper legal opinion and opinion testimony by a lay witness.

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	<p>most notices, because it has sent to Google a copy of the infringing web page which typically displays that information. Perfect 10 has also provided to Google, in its DMCA notices, the complete URL of the blogger.com web page containing the full-size P10 image, along with a copy of that web page.")</p>	
9.	<p>Chou Decl., at ¶ 11 ("I am quite familiar with perfect10.com, which is not a blog. The images on perfect10.com cannot be identified by a 'permalink of the post' as there is no such thing on perfect10.com. I have examined thousands of infringing blogger.com web pages that Perfect 10 included in its DMCA notices to Google. Those web pages consisted of a P10 Image and a blogger.com URL. There was no other text on those web pages, no posts, and no 'permalink of a post.'")</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, speculative, mischaracterize the facts, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony.</p>
10.	<p>Chou Decl., at ¶ 12 ("I have studied Google's DMCA instructions for Image Search and for Web Search. Based on my experience, I believe</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, mischaracterize the</p>

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that Google Image Search instructions are in most cases completely unnecessary, and in many cases, unworkable, as illustrated by the website nudecelebforum.com. This website has infringed thousands of P10 images. It has approximately 60 infringing web pages that contain approximately 17,000 P10 images. To identify the 60 infringing web pages, Perfect 10 could send to Google 60 URLs, with or without the actual infringing web pages. Once Google received those 60 URLs, to block any Google Image Search links from directly linking to any of those infringing web pages, Google would have to remove all thumbnails in its Image Search results that link to any of those 60 web pages, even if the Image Search thumbnail is not a P10 thumbnail, so long as it links to a web page that contains infringing P10 images. *So by specifying the 60 web page URLs, Perfect 10 could permanently block any of 17,000 P10 images from ever appearing in*

documents and facts, speculative, lack foundation, are not within the witness's personal knowledge, and are improper opinion testimony. Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999).

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Google's Image Search results.

However, according to Google's Image Search instructions, Google will only block P10 images from nudecelebforum.com that are *currently* in Google's Image Search results. So it would be impossible to prevent all 17,000 P10 images from appearing in Google's Image search results using Google's Image Search instructions, unless all 17,000 Images were indexed, in which case Perfect 10 would have to identify 17,000 Image URLs, which would be extremely time consuming and completely unnecessary.


Furthermore, even if Perfect 10 were able to do that, Google could still link to the same infringing web pages using a non-P10 thumbnail. That is why by far the best way to identify the infringing material on nudecelebforum.com is to provide the URLs for the 60 infringing web pages. Even though Google's Image Search instructions, in most cases, make the notification process much

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	harder than it needs to be, I have seen that Perfect 10 has identified infringing P10 Images following Google's Image Search Instructions, but that Google nevertheless has not removed such identified images from its Image Search results.")	
11.	Chou Decl. Exh. 1	<u>Fed. R. Evid. 401, 402, 403, 602, 901</u> The evidence is argumentative and irrelevant. In addition, the exhibit is not properly authenticated.

DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By 
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